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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1261

WARD HOLT, *Petitioner*

vs.

TEXAS-NEW MEXICO PIPELINE COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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To the Honorable Harlan F. Stone, Chief Justice of the Supreme Court of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

Your Petitioner, Ward Holt, respectfully prays for the issuance of a Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit, to review the judgment of that Court entered on December 8, 1944, pursuant to an opinion of the Court (145 F. (2) 862), motion of petitioner for a rehearing denied on January 13, 1945, in a case numbered and entitled on its docket "No. 10838, Ward Holt, Appellant, v. Texas-New Mexico Pipeline Company, Appellee." Thereby said Court affirmed a judgment of the United States District Court for the Western District of Texas, in favor of the Defendants in the District Court, granting the defendant a preemptory instruction.

The certified transcript of the record in the case,

including the proceedings in the said Circuit Court of Appeals is presented herewith in accordance with Rule 38 of this Court.

I.

Summary Statement of Matter Involved

The Circuit Court's opinion is incorrect in the following particulars. We know of no better method of calling the attention of this Honorable Court to said errors than to quote from our Motion for Rehearing as filed before the Circuit Court as follows:

"Appellant herein moves the Court to grant him a rehearing upon the action of this Court as shown by its opinion and judgment herein of December 8, 1944, wherein the judgment of the lower court is affirmed; and in this connection appellant respectfully shows unto the Court that a Rehearing should be granted and the judgment of the trial court reversed and remanded on account of the errors hereinafter assigned and specified, being to-wit:

1.

This Honorable Court erred and makes an incorrect statement when it says that Appellant contended for a reversal under only two well settled legal principles. It is true that in our main brief we devoted more time to these two well settled principles, *but in our statement of Points Relied upon in this Appeal, together with our Supplemental Brief filed by the permission of this Honorable Court, as well as our Rejoinder, we thoroughly discussed two other well settled legal prin-*

ciples and that is that (a) That an employer of an independent contractor is liable for a negligent order which proximately causes an invitee's injuries when such order is given within the scope of his employment by his employee, and (b) that the evidence in this case, raises the issue of constructive knowledge of the presence of the dynamite on the Appellee's premises; and that hence it was a question for the jury as to whether or not Appellee should have discovered and removed the dynamite from their premises.

We now earnestly request this Honorable Court to discuss these two propositions of law so that some disposition may be made of same in this hearing. We refer this Honorable Court to the authorities cited not only in our Rejoinder, but also in our Supplemental Argument filed by permission of this Honorable Court after oral argument had been had in this cause, for the evidence and authorities fully sustaining our position as to these two principles of law which have not been discussed by this Honorable Court in the opinion.

Statement

We here set out Appellant's First Point together with our Sixth Point:

1.

The Honorable Trial Court erred in sustaining the motion of the defendant, Texas-New Mexico Pipeline Company, for an instructed verdict upon the ground that the uncontroverted testimony showed that the plaintiff was injured solely by the negligence of his employer in failing to discover and remove the un-

exploded dynamite charge since in this case the evidence showed that Tony Hudler, as inspector for the Texas-New Mexico Pipeline Company, negligently directed the plaintiff by giving instructions to plaintiff's straw boss, John Rush, *and to the crew in which plaintiff was working to go back down the line and to dig out some bumps when at* the time of giving said instructions, four or five unexploded sticks of dynamite had been negligently permitted to exist on the premises of the defendant for a period of some 24 hours. (R. pp. 156-157.)

6.

The Honorable Trial Court erred in sustaining the motion of the defendant, Texas-New Mexico Pipeline Company, for an instructed verdict upon the ground that the evidence failed to show that Tony Hudler knew of the unexploded charges of dynamite since in the case the test is whether or not Tony Hudler in the exercise of the care required by those dealing with highly dangerous explosives such as dynamite, should have discovered the presence of said unexploded charges and in this case the evidence showed that unexploded charges of dynamite remained on the premises of the defendant for more than 24 hours prior to the time of plaintiff's injuries.

This evidence, in and of itself, is sufficient to submit to the jury the question of whether the defendant should have discovered said dynamite and warned plaintiff or removed same. (R. p. 159.)

2.

This Honorable Court erred in holding on page two of the opinion: "Tony Hudler, a welding inspector employed by the company to see that the work met with the specifications of the contract, came up to the group and told the straw boss that there were some humps or irregularities in the rock section of the ditch that would have to be dug out."

Statement

The above statement is incorrect since the order as viewed most favorably to the Appellant is set out on pages 1 and 2 of our Supplemental Argument on file in this cause and said order appears on pages 41, 42 of the Record in this cause, showing that the witness Perkins testified (Perkins being a fellow servant of the Appellant) that Hudler sent the Appellant back "and there was five of us that was sent back over there to dig down those places."

3.

This Honorable Court erred in holding on page three of the opinion "the existence of the danger was unknown to the company."

Statement

The following appears from the Statement (R. pp. 134-135):

"Q. Those other inspectors did not stay out there very much, did they?

"A. Well, there was one of them that was out

there pretty well all the time.

"Q. Who was that?

"A. Enlow I believe was his name.

"Q. How long did he stay there, on the average?

"A. He was out there nearly all day. He had two jobs to look over. He was more or less looking after the doping and also looking after the pipe as it was strung in there, to see there was no bad pipe. It was an old reconditioned line, and they was trying to cut the bad pipe before it was lined up and welded.

"Q. Where was Mr. Koepps,—he was the other inspector on the job?

"A. I don't know. I believe he was over the hill there at the time of the explosion.

"Q. He was there at the time of the explosion?

"A. He was over there where I was.

"Q. He lives in Eunice, New Mexico, doesn't he?

"A. I don't know where he lives.

"Q. At that time he was district engineer for the Texas-New Mexico Pipe Line Company, and still is, isn't he?

"A. Well, I don't know what his title was, to be frank with you.

"Q. He was with the Texas-New Mexico Pipeline Company in an official capacity?

"A. Yes, sir.

"Q. And you don't know whether Mr. Koepps is still with the Texas-New Mexico Pipeline Company or not?

"A. Well, I don't know; I couldn't say.

"Q. Have you seen him here today?

"A. Yes, sir.

"Q. He is here today?

"A. Yes, sir.

"Q. He was there at the time of the explosion?

"A. He was over the hill where I was working with the welders.

"Q. Did he stay out there half the time or not?

"A. Some days he would be out there all the time; some days he was called off to look after other work, and be gone for a day.

"Q. Sometimes they would both be gone, and you would do it by yourself?

"A. I don't believe there was any time I was by myself altogether, that would be along on that part of the ditch."

In the case of *Apex Construction Company v. Farrow*, 71 SW (2) on page 325, the court said:

"Appellants did not produce either of the employees charged with the custody or possession and use of the dynamite caps. Nor did they produce the watchman who guarded the property at the camp site where the dynamite caps were seen by the Richardsons within a few minutes after it had been abandoned and while the camping outfit was still in sight, and later found by the deceased boy and others in the ground and scattered about upon the ground at and around the camp site. This evidence was sufficient to show that Appellants, their agents, servants, and employees negligently left the dynamite caps at the abandoned camp site where the child found them and picked them up and was killed by their explosion in his hands. Especially is this true since appellants

failed to produce or account for the absence of their employees charged with the care, custody or possession of the dynamite caps, and from which failure the jury had the right to infer that the said employees' evidence would have been against appellants under the rule that 'The failure of a party to produce evidence which is within his knowledge, which he has the power to produce, and which he would naturally produce if it were favorable to him, gives rise to an inference that if such evidence were produced, it would be unfavorable to him.' 22 C. J. 111. Or 'such an unfavorable presumption may arise, for example, from the failure of a party to produce testimony peculiarly within his knowledge, or his failure to call witnesses who have knowledge of the facts, especially his own agents or servants.' 17 Tex. Jur. 303, 304, sec. 86; Taylor & Co. v. Nehi Bottling Co. (Tex. Civ. App.) 30 SW (2) 494; Cox v. Bankers' Guaranty Life Co. (Tex. Civ. App.) 45 SW (2) 390."

4.

This Honorable Court erred in holding that the contract here did not call for work which was inherently dangerous, if skillfully performed, upon the proposition that the Appellant was engaged in leveling the ditch with pick and shovels, since the danger to Holt in doing this work from unexploded dynamite was reasonably foreseeable by the Appellee, at the time of entering into the written contract.

5.

This Honorable Court erred in holding that the contract did not call for the performance of inherently dangerous work which would place the absolute duty upon the Appellee to take such precautions to avoid injuries from the contractor's operation, since in this case, the contract called for great quantities of dynamite, requiring a period of several days of blasting at least for a distance of some two miles in rock; and the Texas Courts have always held that such amount of blasting is inherentiy dangerous and the fact that said blasting takes place upon open prairie lands *where a great number of employees are invited to participate in the blasting does not decrease the danger from unexploded dynamite, which was a danger accompanying the operation from beginning to end.*

See *Seismic Explorations v. Dobray*, 169 SW (2) 739, error refused, in which the Galveston Court of Civil Appeals said:

> "The evidence upon the trial showed as a matter of law, contrary to plaintiffs' assumption, that the contract between Phillips and Seismic did not contemplate any blasting operations. According to Webster, blasting means 'the practice or occupation of rending heavy masses, especially of rock, by means of explosives, as in oil-well drilling, quarrying, etc.' It is obvious that heavier charges of dynamite are required to rend heavy masses such as rocks than are required merely to produce and set in motion vibrations. The undisputed evidence showed that the maximum charge of dynamite which it was necessary or proper to be used

in the test then being made was a charge of dynamite weighing not more than half a pound. The contract contemplated that no greater charges of dynamite would be exploded than were normal for the purpose of making reflection seismograph tests. It is true that in the case of Cisco & N. E. Ry. Co. v. Texas Pipe Line Co., Tex. Civ. App. 240 SW 990, which dealt with blasing operations, stone, cast upon the land of another, was so large and cast with such force as to break a pipeline whereby 500 barrels of oil were lost; it was there held: That the Ry. Co. which had engaged an independent contractor to do the blasting was liable for the damages caused *because the contract provided for the performance of work which was intrinsically dangerous, however skillfully performed.* That case is cited in an annotation to a paragraph in 19 Tex. Jur. pg. 467, which reads in part; 'as to explosives set off by an independent contractor, it has been said that ordinary blasting operations in themselves are not considered as so intrinsically dangerous as to render the employer liable for the contractor's negligent acts; that is, the employer is not liable by reason of employing a contractor to do the work; there is not imposed upon him the absolute duty to take special precautions to avoid injuries from the contractor's operations.' So we see that the law recognizes that even blasting operations are not per se intrinsiaclly dangerous. *That the danger depends upon the size of the explosive discharge is obvious, and where the amount of explosive used is so small that it will not cause a shock great enough to do more than set up vibrations, and not great enough to amount to BLASTING, such operation cannot be called intrinsically dangerous.* We have seen

that the Phillips did not engage to have work performed which was 'intrinsically dangerous, no matter how skillfully performed.' "

SINCE THE MOTION FOR REHEARING WAS OVERRULED IN THIS CASE, WE HAVE DISCOVERED THE FOLLOWING ADDITIONAL EVIDENCE WHICH WE FEEL REQUIRES THAT A WRIT OF CERTIORARI BE GRANTED: THAT EVIDENCE IS REFLECTED IN THE AFFIDAVIT OF JAMES E. JETT, A TRUE AND CORRECT COPY OF WHICH IS HERE SET FORTH:

My name is James E. Jett. I was dynamite man for T. E. King Construction Company on the job that Ward Holt was injured on by virtue of an unexploded charge of dynamite.

We were setting off the dynamite recklessly and carelessly. By this, I mean that we were taking a fuse and cutting notches in it so that fire would burn through the fuse and every time that the fire would burn through, we would apply it to another shot that had been theretofore set.

We would load approximately one hundred and fifty (150) shots at a time and then we would apply the fire to as many shots as we thought safe and then we would run.

Under such circumstances, we would often leave unexploded shots. On several occasions we would go back and relight unexploded shots.

On the morning that Holt was injured, we found and reshot a number of unexploded shots some four

or five in the place where Holt was injured. We did this before Holt's injury.

We were lighting as high as 30 shots at a time before the date of Holt's injury. However, after Holt's injury, we were required to slow down to five or ten shots at a time so that we could be sure to count them, and thus, explode all of the dynamite that we had theretofore set out.

Some, in fact, many of these holes were drilled and loaded at night due to the fact that we were trying to keep ahead of the pipe line gang and it was necessary that the ditch be dug before they could lay the pipe.

The orders that we had were to get the job done as quickly as possible since we, that is the dynamiting crew, were behind with our work.

I am well acquainted with Tony Hudler and Koepps. They were with the dynamiters a great deal of the time because they had to pass upon the depth of the ditch.

The dynamiting crew, that is myself, Reed, and Fred Hobbs and Ed Hubbs, knew that there was unexploded dynamite in the vicinity of where Holt was injured before he was injured.

We discussed the fact that these unexploded shots were present among ourselves and I am sure that the above named inspectors, Tony Hudler and Koepps, must have heard us since they were with us practically all of the time.

I do know positively that Tony Hudler and Koepps

personally knew and saw that it was necessary for us, that is the dynamiting crew, to go back and relight unexploded dynamite a number of times before the time of Holt's injury. They therefore, knew that there was great danger at all times from unexploded dynamite.

I have had ten or twelve years experience shooting dynamite and the only safe way to shoot dynamite is with a battery and electric fuses. This is the customary way to shoot same. We did not shoot same with a battery on this occasion because no battery was furnished us.

The other contractors that I have worked for in setting out dynamite who did furnish a battery are Jack Walton, Hobbs, N. M.; Bill Hamrenhand, Dallas, Texas; and R. H. Fulton Construction Company, Lubbock, Texas.

I was doing the same type of work for the other contractors, that is—digging a pipe line ditch and the battery is convenient and practical as well as safe.

T. E. King is the only contractor that I ever worked for in setting out dynamite that failed to use a battery and electric fuses since it is recognized that this is the customary, proper and only safe way to shoot dynamite.

I am a licensed dynamite shooter.

A good personal friend of mine who was at the time and still is employed by the Texas-New Mexico Pipe Line Company told me that "If I was you, I wouldn't

have anything to do with that case since it might hurt you in going to work for the Texas-New Mexico."

At that time, I was intending to go to work for the Texas-New Mexico. This is the reason I did not tell Mr. Watts, attorney for Holt, when he phoned me in Houston, Texas, the matters here set forth.

I have read the above statement in its entirety and same is true and correct.

WITNESS MY HAND this 16th day of February, A. D. 1945.

/s/ JAMES E. JETT
JAMES E. JETT

STATE OF TEXAS)
COUNTY OF CRANE)

Before me, the undersigned authority, on this day personally appeared James E. Jett, to me well known, who after being by me duly sworn, deposes and says that he has read the foregoing statement and same is true and correct.

/s/ JAMES E. JETT

SWORN TO AND SUBSCRIBED BEFORE ME, this 16th day of February, A. D. 1945.

/s/ EUGENE J. WASSON
Notary Public in and for
Crane County, Texas

My commission expires 6-1-45.

II.

Jurisdiction

(1) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, (28 U. S. C., Sec. 347).

(2) The judgment of the Court of Appeals was rendered in a civil action.

(3) The date of the judgment to be reviewed is December 8, 1944.

Petition for rehearing filed by respondents was denied January 13, 1945. And on April 13, 1945, Justice Black extended the time of filing to May 12, 1945.

(4) It is believed that the following cases sustain the jurisdiction of this Court:

West v. American T. & T. Co., 311 U. S. 223, 85 L. ed. 139;
Story Parchment Co. v. Patterson Parchment Paper Co., et al, 282 U. S. 555, 75 L. ed. 544;
Galloway v. United States, 319 U. S. 372, 87 L. ed. 1458;
Cities Service Oil Co. v. B. P. Dunlap, et al, 308 U. S. 208, 84 L. ed. 196;
Griffin v. McCoach, 313 U. S. 498, 85 L. ed. 1481.

(5) The decision of the Court below conflicts with the decisions of other Circuit Courts of Appeals on similar matters and said Circuit Court has decided important questions of local law in a manner in con-

flict with the decisions of the Texas Courts, and said Circuit Court has decided important questions of general law in a manner that is conflicting with the weight of authority; and the opinion of the Circuit Court constitutes such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Wherefore under Rule 38 (5) (b) of the Revised Rules of the Supreme Court of the United States, this discussion may be reviewed by this Honorable Court.

III.

Principal Questions Involved

(a) That an employer of an independent contract is liable for an negligent order which proximately causes an invitee's injury, which such order is given within the scope of his employment by his employee.

(b) That the evidence in this case and particularly the evidence discovered since the Motion for Rehearing was overruled by the Circuit Court of Appeals, as set out in the affidavit of the said Jett, raises the issue of actual knowledge of the presence of the dynamite on the Respondent's premises, and hence it was a question for the jury as to whether the Respondent should have removed the dynamite from their premises prior to Petitioner's injury, or at least have warned the Petitioner of the presence of the dynamite on their premises.

(c) The opinion of the Circuit Court is in error and in conflict with the Texas decisions when it held that the work here involved was not intrinsically or inherently dangerous.

IV.

Reasons Relied on for Allowance of the Writ

We feel that the Motion for Rehearing together with the affidavit of Jett setting forth newly discovered evidence as heretofore set out, *clearly shows the necessity of this Honorable Court granting this writ in order that justice may be done.*

WHEREFORE, your Petitioner prays that a writ of certiorari issue under the seal of the Supreme Court of the United States, directed to the United States Circuit Court of Appeals for the Fifth Circuit, demanding that Court to certify and send to this Court a full and complete transcript of the Record and of the Proceedings of the said United States Circuit Court of Appeals for the Fifth Circuit had in this cause numbered and entitled on the docket "Number 10,838, Ward Holt, Appellant v. Texas-New Mexico Pipeline Company, Appellee," to the end that this cause may be reviewed and determined by this Court, as provided for by the Statutes of the United States, and that the judgment here of the said United States Circuit Court of Appeals be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated this 10th day of May, 1945.

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JOHN J. WATTS
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of Counsel